HOME

SUPREME COURT JUDGMENTS

THE REPUBLIC v. HIGH COURT, KUMASI, EX-PARTE ALHAJI ADADU ABUBAKAR, BETWEEN CHIEF ALHAJI IBRAHIM ABDULRAHMAN & ANOR. [15/12/1999] CM NO. 40/98

IN THE SUPERIOR COURT OF JUDICATURE

THE SUPREME COURT

ACCRA - GHANA

Coram: Edward Wiredu, J.S.C. (Presiding)

Mrs. J Bamford-Addo, J.S.C.

Ampiah, J.S.C.

Adjabeng, J.S.C.

Acquah, J.S.C.

Atuguba, J.S.C.

Ms. Akuffo, J.S.C.

Civil Motion No. 40/98

15th December, 1999

THE REPUBLIC

VERSUS:

HIGH COURT, KUMASI

EX-PARTE ALHAJI ADADU ABUBAKAR

BETWEEN

CHIEF ALHAJI IBRAHIM ADULRAHMAN ... APPLICANT

- AND-

ALHAJI AMADU ABUBAKARI ... RESPONDENT

RULING

EDWARD WIREDU J.S.C.:

I have had the privilege of reading before-hand the able and learned opinion about to be read by my brother Acquah J.S.C. in this case - being an application for a review of the majority decision of this court given on 13th May 1998. I concur in both his reasoning and conclusion.

Article 277 of the 1992 Constitution defines a "chief" as follows:

"In this Chapter unless the context otherwise requires,

'chief means a person, who, hailing from the appropriate family and lineage, has been validly nominated, elected or selected and enstooled, enskinned or installed as a chief or queenmother in accordance with the relevant customary law and usage" (Emphasis is mine)

And in the celebrated case of Mosi v. Bagyina [1963] 1 GLR 337, the Supreme Court held (as stated in holding (4) at p.338 as follows:

"Where a judgment or an order is void either because it is given or made without jurisdiction or because it is not warranted by any law or rule or procedure, the party affected is entitled ex debito justitiae to have it set aside, and the court or a judge is under legal obligation to set it aside, either suo motu or on the application of the party affected. No judicial discretion arises here. The power of the court or a judge to set aside any such judgment or order is derived from the inherent jurisdiction of the court to set aside its own void orders and it is irrespective of any expressed power of review vested in the court or a judge; and the constitution of the court is for this purpose immaterial. Further, there is no time limit in which the part affected by a void order or judgment may apply to have it set aside. Craig v Kanseen [1943] 1 KB 256, CA.; Forfie v Seifah [1958] AC 59, PC; Amoabimaa v Badu (1957) WALR 214, WACA; Concession Enquiry No 471 (Ashanti) [1962] 2 GLR 24, SC and Ghassoub v Dizengoff [1962] 2 GLR 133, SC applied."

The principle enunciated in the Bagyina case (supra) is essentially jurisdictional and it goes to the root of any decision thus given.

On the facts of the instant case, it is clear that there was a misconception on the part of the majority of the court (per Abban C.J. and Charles Hayfon-Benjamin and Ampiah JJ.S.C. - Atuguba and Sophia Akuffo JJ.S.C. dissenting) as to what was the real issue for which the parties were contesting. The issue was a straightforward case of who had been validly appointed the Head of the Moshie Community in Kumasi simpliciter. It had nothing to do with "chieftaincy" a concept commonly described in legal parlance a "cause or matter affecting chieftaincy" within the language of the Chieftaincy Act, 1971 (Act 370). The Headship of the Moshie Community, on the available facts, clearly is not linked to: (a) any recognised stool or skin within the Kumasi Traditional Area; and (b) its eligibility is not confined to any particular family and lineage of the Moshie Community in Kumasi as prescribed by article 277 of the 1992 Constitution. The sole qualification is that it is open to all members of the Moshie Community who live in Kumasi and who have distinguished themselves individually in their own individual capacities and in their various calling while staying in Kumasi.

The presentation of such a head to the Asantehene does not elevate such a head to a recognised chief in the Kumasi Municipality or Ashanti. The decision of the majority of this court in favour of the respondent, Alhaji Abubakari, in this application for a review, therefore, was given per incuriam in relation to the constitutional definition of a "chief' under article 277 of the 1992 Constitution.

The decision of the court (reported as Republic v. High Court, Kumasi; Ex Parte Abubakari (No. 2) [1998-99] SCGLR 904), which had culminated in the granting of an order of certiorari to quash the Kumasi High Court's decision on the basis that the matter was a "cause or matter affecting chieftaincy", was wrong. The majority of this court as presently constituted is of the view that the quashing of the decision of the Kumasi High Court on grounds of want of jurisdiction was fundamentally wrong and had occasioned a serious miscarriage of justice and ought to be reviewed. The applicant has demonstrated that there has been a basic error of law committed by the majority of the court in its judgment given on 13th May 1998 and this error, which is basic and fundamental, has resulted in a grave miscarriage of justice.

MRS. BAMFORD-ADDO, J.S.C.:

I have also had the privilege of reading beforehand the ruling to be read by my brother Acquah J.S.C. I also agree with his reasoning and conclusion that the application for a review of the majority decision of this court in this case given on 13th May 1998 be granted. I have nothing useful to add.

AMPIAH, J.S.C.:

On 13th May 1998, this court (per majority of three to two) granted an application for certiorari to quash the judgment and proceedings of the High Court, Kumasi, on grounds of lack of jurisdiction. By a majority of three to two, this court held that the proceedings before that court involved in a "cause or matter affecting chieftaincy" and that the High Court had no jurisdiction to entertain the matter. The application now before this court, is by the interested party in the application in the Supreme Court for certiorari (ie the plaintiff in the proceedings before the trial High Court) - seeking an order reviewing the earlier decision on the ground, inter alia, that there are, "exceptional circumstances which have resulted in miscarriage of justice."

The issue before the High Court, as was raised in the certiorari application, was that the matter was a cause or matter affecting chieftaincy. It is true that on the pleadings neither pleaded the matter as being a cause or matter affecting chieftaincy; but on the evidence and the submissions that arose during the trial, it became necessary for the court to determine whether or not the case before it was a cause or matter affecting chieftaincy. The court ruled that it was not a cause or matter affecting chieftaincy and gave judgment for the plaintiff, now the applicant in the instant proceedings.

An issue of jurisdiction, the courts have held, being an issue which goes to the root of the action, could be raised at every stage of the proceedings. Where a court assumes jurisdiction which it has not, the whole proceedings become null and void. This court has held in the case of Republic v. High Court, Denu; Ex Parte Avadali IV, CM No. 15/93, 14th December 1993, that in such a situation an order of certiorari would lie to quash those proceedings. It was in the light of these principles as laid down by this court that the defendant-applicant (now respondent in this application) brought the certiorari proceedings to this court for the court to make the necessary declaration. The issue of jurisdiction was therefore the main issue before this court in that application.

The arguments raised by the applicant herein are not different from the ones raised in the certiorari application: see the statement of case filed by the applicant herein. The issue was fully considered by this court and a decision was arrived at on that issue, namely that the matter before the court was "a cause or matter affecting chieftaincy."

In the present application, no new evidence has been adduced to warrant a re-consideration of the issue. The issue of jurisdiction cannot be said to raise exceptional circumstances to entitle this court to overturn its decision on the issue. It is quite clear from the arguments adduced by the applicant that with the hope of a

favourable panel he seeks to overturn the valid decision of this court; he requests this present constituted panel to sit on an appeal on the decision of the court. This, he cannot do, and it should not be encouraged by this court.

In proceedings such as the one now before the court, I think it would be instructive to refer to the observations made by Francois J.S.C. in the case of Afranie II v. Quarcoo [1992] 2 GLR 561 at p. 564-565. His Lordship said:

"A review is only legitimate where exceptional circumstances exist which unredressed would perpetuate a miscarriage of justice; but a review is not another avenue for an appeal. In my view, the distinction is of paramount importance. If disregarded, an enhanced bench might well assume it possesses limitless power to review the correctness of a decision on the law, a function which is permissible only when a matter is on appeal and not otherwise. It follows that the repetition of previous arguments and the revisit to past scenarios cannot properly lay a foundation for review. In my view, where the same grounds are canvassed again, the exercise ceases to be a review. It is the appeal process which is being invoked and substituted for the review exercise, twice too often. This must be decried. Dicta of Lords Reid, Pearson and Simon of Glaisdale in Jones v Secretary of State for Social Services; Hudson v Same [1972] 1 All ER 145 at 150, 174 and 196 HL respectively; of Stephenson LJ in Carr v Carr [1974] 1 All ER 1193 at 1196, CA and Apaloo JA (as he then was) in A/S Norway Cement Export Ltd. v Addison [1974] GLR 177 at 182 (full bench) CA cited.

I agree with this observation. I do not think a case has been made up in this application for review. I would accordingly dismiss the application.

ADJABENG, J.S.C.:

I have read the learned opinion of my brother Acquah J.S.C. and also the supporting opinion of my brother Edward Wiredu J.S.C. I agree entirely with their reasoning and conclusion and I have nothing useful to add. I agree therefore that the majority decision of this court in the matter ought to be reviewed and the decision reversed.

ACQUAH, J.S.C.:

This is a ruling in respect of an application for a review of the decision of the ordinary bench of this Court delivered on 13th May, 1998. But first the facts.

On 12th December, 1994 Alhaji Ibrahim Abdulraham died. At the time of his death he was the head of the Moshie Community in Kumasi and had indeed occupied that position for the past twenty three years. An election of his successor lead to the division of the Moshie Community of Kumasi breaking up into two factions: The Council of elders headed by Alhaji Abubakar Sana, and another group described as sub-community heads headed by Osman Oaudrago of Ayigya Moshie Zongo.

The Council of Elders selected Alhaji Abdulrahman Adam, the son of the late head, Alhaji Ibrahim Abdulraham, to succeed his father as the head of the Moshie Community, while the sub-community heads selected Alhaji Amadu, the respondent herein, for the same position. Since two persons cannot occupy that single position, Alhaji Abdulraham Adam, the applicant herein issued out a writ of summons at the High Court, Kumasi, against Alhaji Adama, as the defendant, for

1. Declaration that the plaintiff is the substantive Kumasi Moshie Community head.

2. An order of perpetual Injunction to restrain the defendant whether by himself, his agent or servants from representing himself as the Kumasi Moshie Community head or purporting to act as such.

3. An order of perpetual injunction to restrain the defendant whether by himself, his agents, servants or whosoever from interfering in the plaintiff's performance of his duties as the substantive Kumasi Moshie Community head.

4. General damages.

The respondent denied the claim and counter claimed for:

1. A declaration that the defendant is the head of the Moshie Community in Kumasi who has been duly selected and installed and recognised by Otumfuo the Asantehene.

2. Perpetual Injunction restraining the plaintiff from styling, posing, representing himself as the head of the Moshie Community in Kumasi.

The evidence before the High Court clearly established that after the plaintiff was nominated by the Council of Elders, he was presented to the head of the Mamprusi Community in Kumasi for his installation as head; while the Defendant was also presented, after his nomination to the Moshie Iman for installation. The issue before the High Court then was, to determine which of the two was validly installed the head of the Moshie Community in Kumasi.

In a well-considered opinion in which the relevant legal principles were applied, the trial High Court judge held that:

1. The nomination of a candidate for the post of the Moshiehene of Kumasi is done by the Council of Elders of the Moshie Community in Kumasi.

2. That the installation is done by the Mamprusihene of Kumasi, and not by the Moshie Iman.

3. That the plaintiff was nominated by the Council of Elders, and installed by the Mamprusihene of Kumasi, so the plaintiff is the valid substantive Moshiehene of Kumasi.

4. That the defendant was not properly nominated and installed as the Moshiehene of Kumasi, so he is not the Moshiehene of Kumasi.

The counterclaim of the defendant was dismissed and judgment entered for the plaintiff for the reliefs endorsed on his writ of summons. ¢1,000,000 general damages plus ¢500,000 cost were awarded for the plaintiff.

The defendant initially lodged an appeal to the court of Appeal against this judgment, but he later abandoned same and rather invoked the supervisory jurisdiction of his Court to quash the High Court's judgment on ground that the suit was a cause or matter affecting chieftaincy.

This court, by a split decision of 3:2 upheld the defendant's contention and quashed the judgment. It is this majority decision which is challenged here on a review.

Now from his statement of case, the ground for seeking the review is one of jurisdiction, in that the Kumasi High Court had jurisdiction to determine the dispute between the parties because it was not a cause or matter affecting chieftaincy. For the head of the said community is not a chief within the legal definition of the word. The respondent on the other hand contends otherwise.

Rule 54 of the Supreme Court Rules 1996 (C.I. 16) sets out two grounds for a review:

(a) exceptional circumstances which have resulted in a miscarriage of justice;.

(b) discovery of new and important matter or evidence which after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by him at the time when the decision was given".

A review founded on jurisdiction is obviously one falling within the ambit of exceptional circumstances. For jurisdiction is so fundamental in the adjudication of any dispute that whenever it is established that an adjudicating authority had no jurisdiction in the matter it purported to determine, its proceedings and judgment are liable to be quashed. Accordingly it is settled that the issue of jurisdiction can be raised at any time in the course of a litigation. Thus in CM21/96, Abel Edusei vrs Attorney-General & Ors. 22/4/98. S.C. (unreported), this court held that the issue of jurisdiction constitutes an exceptional circumstance within rule 54(a) of C.I. 16. For in that case, I said:

"... I certainly agree with the applicant that the issue of jurisdiction be it a wrongful assumption or rejection, is such a fundamental issue as to constitute an exceptional circumstance entitling a party to apply for a review. But as to whether he will eventually succeed in his quest for a review, is of course, another matter."

Mrs. Bamford-Addo, JSC, on her part, said:

"Since jurisdiction is a fundamental issue, the absence of which would render any decision of a court null and void, it is of utmost importance for a Court to ensure that in any case brought before it, it has the requisite jurisdiction to hear and determine that case. Where there is lack of jurisdiction a court ought to decline jurisdiction. In the same manner where a court has jurisdiction in any case it should accept jurisdiction and adjudicate on it. It would be wrong in such a case to decline jurisdiction, as this would result in injustice to an applicant and would constitute exceptional circumstance for which a review would be granted under Article 133 of the 1992 Constitutional" (emphasis mine)

The status in dispute, is the head of the Moshie Community in Kumasi. The Moshies are not Ashantis, they are migrant settlers who have organized themselves into units in Kumasi and other parts of Ashanti. Having found themselves into such organized units they found it prudent to device a system of selecting their head. And it was this system which was in dispute between the parties. While the plaintiff/applicant contended that the system of selection was by a Council of elders and thereafter the candidate is presented to the Mamprusihene of Kumasi, the respondent alleges that the selection is by a sub-community heads and the candidate is then presented to the Moshie Imam.

The evidence before the High Court, as borne out by the records before us further shows that because the Moshies are strangers on the land, the qualification for a candidate for headship is not based on blood or any royal lineage. As the High court judge found:

"Now one important fact was agreed upon by all the parties. That is, that the post of the Moshiehene of Kumasi is not hereditary, but that any Moshieman with a good reputation is qualified to be appointed the Moshiehene of Kumasi elect".

Indeed the applicant pointed out in his statement of case filed on 9th June 1998, that the respondent pleaded in paragraph 7 of his Statement of Defence filed at the High Court, as follows:

"The headship of the Moshie Community is neither a stool or skin"

On these facts as found by the trial judge, the question is: Is the head of such community of migrant Moshies in Kumasi and other parts of Ashanti, a chief within the legal definition of the word?

Article 277 of the 1992 Constitution which reproduced the definition of a chief in the 1979 Constitution, reads:

"... "chief" means a person, who hailing from the appropriate family and lineage, has been validly nominated, elected, selected and enstooled, enskinned or installed as a chief or queenmother in accordance with the relevant customary law and usage".

The above definition requires that for one to qualify to be a chief he must hail from the appropriate family or lineage — that is, be a member of the family or lineage from which a candidate must be selected; and his nomination, election etc must be in accordance with the established customary law and practice governing that position.

The facts admitted by the parties before the trial High Court clearly show that the headship of the Moshie Community does not satisfy any of the conditions in the definition of chief quoted above.

Chieftaincy, as Justice Ollenu said in his paper "Chieftaincy under the Law" published in Essays in Ghanaian Law page 38 at page 52:

"... is an ancient institution, the centre of rich culture, an object of awe and reverence as the active possessor of state power and possessor of the spirit of the ancestors and the state".

And as successors of their ancestors, customary law requires that chiefs should come from particular kindred groups, to which the stool or skin belongs. Of course, a person who is not a royal nor holder of a traditional office may in some cases be created a chief in recognition and appreciation of special services rendered or honour done to the town or state, or for distinguishing himself in any field of life or the other. And it is because this institution is so fundamental and part and parcel of our life that the 1969, 1979 and 1992 Constitutions each guaranteed it as established by customary law and usage. In the face of the definition of a chief in article 277, it will be totally unacceptable to contend that heads and leaders of migrant communities on "foreign" lands are chiefs. This will of course imply that not only the head of the Moshie community in Kumasi will qualify as a chief, but also the heads of the Fante, Ewe, Nzima, Ga, Yoruba, Indian and other communities would all be chiefs. And in this case, the evidence shows that the Moshie community has sub-community heads. They would also qualify as sub-chiefs. This is absurd.

In my view the definition of a chief in article 277 does not cover the head of a migrant community in Kumasi nor in London.

Indeed as ably demonstrated by my respected and learned brother, Atuguba JSC, in his dissenting opinion, the word "Moshiehene" is alien in Moshie custom. Thus as Ollenu J said in Amegbe vrs. Tepa 1958 2 WALR 392 at 395:

"First, the allegation that the title "Odikro" is a Twi term unknown to the Ewe constitution in itself shows that an assumption of that title by the plaintiff cannot raise any question of political or constitutional relationship between the plaintiff and any other chief. Had the title "Odikro" been known to the Ewe constitution ... there would be by custom and tradition a recognized political and constitutional relationship between holder of the title and the other chiefs in the state; and consequently the assumption of the title by a chief must raise the issue of those political and constitutional relationships. But none of those issues can arise where the title is unknown." (emphasis supplied).

In the instant case where at the trial court, the parties by the formulation of their reliefs, pleadings and submissions had no doubt that the headship of the Moshie community was not a chief within the definition and customary acceptation of that word, the respondent who sought certiorari at the Supreme Court on grounds that the headship is now of the status of a chief, must provide prima facie evidence in support of that contention. It is not enough to rely on the use of expressions like 'Moshiehene' and 'chief appearing at one or two places in the record.

Luckily, the Chieftaincy Act 1971 (Act 370), had under section 50 thereof mandated the National House of Chiefs to maintain "the National Register of Chiefs". And section 50(8) of Act 370 provides:

"The contents of the Register shall be prima facie evidence of the existence of any facts or particulars stated herein."

Since the undisputed evidence on record shows that one Alhaji Ibrahim Abdulraham was the head of the Moshie Community for twenty-three years before he died in 1994, implying that he became head in 1971 at a time when section 48(2) of Act 370 was in force, there must be a record at the national House of Chiefs of the entering of the name and particulars of that head as chief. For as Justice Ollenu in his paper referred to supra, submitted at page 49 thereof:

"Since chieftaincy is founded upon tradition and customary law, and since the accredited holders of traditional office are custodians of the traditions and customary laws of the people, it is respectfully submitted that registration of the name of a person as chief by the National House of chiefs, under section 48(2) of the Chieftaincy Act 1971, amounts to a declaration by the National House of Chiefs that the person has been installed in accordance with customary law; in other words registration is recognition of a chief by the National House of Chiefs".

Of course, such a recognition is only prima facie of the claim of that person as a chief. And can therefore be rebutted by evidence showing, inter alia, that he is not from the appropriate family or lineage; or if even he was, he was not installed in accordance with custom; or he procured the registration in the National Register of chiefs by fraud; or he is even not the person registered as such.

Thus evidence of the registration of the late Alhaji Ibrahim Abdulraham as chief, by virtue of his status as head of the Moshie community during his time would have raised a genuine case of chiefly status of that head to be rebutted by the opponent. No such record was exhibited and obviously no such record existed.

On the evidence and admission of the parties therefore, the trial judge could not but find:

"...that these heads of stranger ethnic communities are not chiefs. They cannot therefore be accorded formal customary recognition as chiefs; as to do so, will tend to bring down the dignity of the sacred institution of chieftaincy to nought; for a time will come when it will become difficult to differentiate between a chief properly so-called, and a chaff."

In sum therefore I fully endorse the erudite dissenting opinions of my learned colleagues Atuguba and Sophia Akuffo JJ.S.C. from the majority decision that the dispute is not a cause or matter affecting chieftaincy, and accordingly the judgment and orders of the trial High Court Judge were made within jurisdiction and therefore ought to stand. I would thus allow the application for the review of the majority decision.

ATUGUBA, J.S.C.:

I agree with the opinion just delivered by my learned and respected brother Acquah J.S.C. that the application for a review of the majority decision given on 13th May 1998 in this case be granted.

MS. SOPHIA AKUFFO, J.S.C.:

I also agree with the opinion delivered by my brother Acquah, J.S.C. that the application for review of the majority decision be granted. I have nothing useful to add.

COUNSEL

Mr. Peter Ala Adjetey, with Mr. Somuah Asamoah, for the Applicant.

Mr. Ahenkorah for Respondent.